Filed 11/1/19 P. v. Criado CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EDDIE CRIADO, Defendant and Appellant.	H045429 (Monterey County Super. Ct. No. SS161562)

Citing prosecutorial misconduct and instructional error, appellant Eddie Criado challenges his convictions for robbery (Pen. Code, § 211)[1] and misdemeanor possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), as well as the jury's true finding that he personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)). For the reasons set forth below, we affirm the judgment.

I. PROCEDURAL BACKGROUND

Criado was charged by information with second degree robbery in violation of section 211 (count 1), misdemeanor burglary in violation of section 459 (count 2), and misdemeanor possession of methamphetamine in violation of Health and Safety Code

[1] Unspecified statutory references are to the Penal Code.

section 11377, subdivision (a) (count 3). With respect to count 1, the information alleged Criado had used a deadly weapon (§ 12022, subd. (b)(1)). The information further alleged that Criado had suffered two prior prison commitments (§ 667.5, subd. (b)).[2]

Following a two-day trial, the jury found Criado guilty of robbery and possession of methamphetamine but acquitted him of burglary. The jury also found that Criado had personally used a deadly or dangerous weapon during the commission of the robbery. Criado waived his right to a jury trial on the remaining enhancements, and the trial court found true the allegations that Criado had served two prior prison commitments. The trial court sentenced Criado to six years in state prison.

II. DISCUSSION

On appeal, Criado challenges his convictions, arguing that they must be reversed on the basis of prosecutorial misconduct and instructional mistake. For the reasons explained below, we reject Criado's contentions of error.

A. *Prosecutorial Misconduct*

Criado contends the prosecutor during closing arguments impermissibly vouched for the credibility of the victim's testimony by making an "odd and gratuitous reference" to the Monterey County District Attorney and by referring to facts outside the record. These remarks prejudiced his right to a fair trial, Criado argues, because "the credibility of the victim was essential to proof of the People's case." Criado acknowledges that his trial counsel did not object to the relevant statements but asserts that the claim of error is not forfeited because an objection would have been futile. Alternatively, Criado contends that, if his counsel's failure to object forfeits his claim of prosecutorial misconduct, then his counsel was prejudicially ineffective for failing to make a timely objection.

The Attorney General asserts that Criado forfeited the misconduct allegation by failing to object to the statements at issue and by neglecting to request a curative

[2] Although the information also alleged that Criado had a prior strike conviction (§ 1170.12, subd. (c)(1)), that allegation was dismissed prior to trial.

instruction from the trial court. As to the merits of Criado's claim, the Attorney General argues that the prosecutor did not commit misconduct because the disputed statements did no more than "reference[] the common experiences of all county residents challenged by natural calamities" and did not vouch for the robbery victim.

1. Factual Background

The prosecutor began his closing statement by saying: "Before I get started, I want to thank everybody for being jurors. Thank you so much for being here. Thank you for your time and your efforts. [The Monterey County District Attorney], my boss, thanks you." Subsequently, the prosecutor told the jury: "Our obligation, we have to bring the evidence in. If we don't bring it in, we don't prove it. Well, to get [the victim] here was some challenge. You can imagine down [in] South County, it's common knowledge that [the] bridge is out, it's a long trip. If we don't get him here, he doesn't come in here and testify, we don't prove it, okay. But he did come in. He did tell you the evidence. And he was believable. That's the main—that's the main ingredient of this. So he did do that."

2. Legal Standards

With respect to state law claims of prosecutorial misconduct, we examine whether "there was a 'reasonable likelihood of a more favorable verdict in the absence of the challenged conduct,' " and under federal law, for whether the claimed misconduct was " 'harmless beyond a reasonable doubt.' " (*People v. Rivera* (2019) 7 Cal.5th 306, 334 (*Rivera*).) Additionally, "[t]o preserve a claim of prosecutorial misconduct for appeal, . . . the defendant must have raised a timely objection and requested that the jury be admonished to disregard the offending remarks." (*People v. Johnson* (2016) 62 Cal.4th 600, 652.)

The conduct challenged here—which Criado labels as impermissible vouching—" 'may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not

presented to the jury supports the witness's testimony.' " (*Rivera, supra*, 7 Cal.5th at p. 336.) "A prosecutor's conduct violates a defendant's constitutional rights when the behavior comprises a pattern of conduct so egregious that it infects the trial with unfairness as to make the resulting conviction a denial of due process. The focus of the inquiry is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor. Conduct that does not render a trial fundamentally unfair is error under state law only when it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Young* (2019) 7 Cal.5th 905, 932, internal quotation marks and citations omitted.)

3. Analysis

Based on the statements made by the prosecutor, Criado asserts two instances of prosecutorial misconduct. Criado contends that the prosecutor's reference to the elected district attorney was gratuitous name-dropping that sought to invoke the prestige of the district attorney's office and thereby to bolster the victim's credibility. Criado also argues that the prosecutor improperly referenced facts outside the record because "[t]here [was] no evidence in the record of any bridge being out."

a. Forfeiture

Turning first to whether Criado has preserved his prosecutorial misconduct claims for appellate review, Criado acknowledges forfeiture applies because of his lack of contemporaneous objection to the statements he now challenges. Criado nevertheless argues his lack of objection should be excused because an objection would have been futile and a curative admonition by the trial court would have been ineffective because "the bell could not be unrung." We agree that Criado's failure to object to the statements in the trial court forfeited this claim for appellate review, but we reject Criado's contention that any exception to forfeiture applies.

"A defendant claiming that one of these exceptions [to forfeiture] applies must find support for his or her claim in the record." (*People v. Panah* (2005) 35 Cal.4th 395,

462.) "The ritual incantation that an exception applies is not enough." (*Ibid*.) Criado does not make the requisite showing as he points to nothing in the record to support his assertion of futility, and he cites nothing to suggest that the trial court would have overruled a timely objection or would have refused to give a curative admonition.

Similarly, Criado's rationale that "the bell could not be unrung" is speculative. "[A]rguments of counsel 'generally carry less weight with a jury than do instructions from the court' " (*People v. Mendoza* (2007) 42 Cal.4th 686, 703). When those arguments "run[] counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former." (*People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1268.)[3] These general principles suggest the efficacy of a curative instruction by the trial court had Criado made a timely objection. Because Criado has pointed to no specific facts that suggest the ineffectiveness of a curative admonition, he has not carried his burden of showing that his forfeiture should be excused.

b. Ineffective Assistance of Counsel

Criado argues in the alternative that if this court deems his prosecutorial misconduct claim to have been forfeited, then defense counsel was constitutionally ineffective for failing to object to the prosecutor's statements.

A criminal defendant's right to effective assistance of counsel is guaranteed under the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*); *People v. Rices* (2017) 4 Cal.5th 49, 65.) Whether on direct appeal or in collateral proceedings, a defendant "claim[ing] that counsel's assistance was so defective as to require reversal of a conviction" bears the burden of proving that counsel's deficient performance resulted in prejudice. (*Strickland*, at p. 687.)

[3] The jury was instructed with CALCRIM No. 222, which states that "[n]othing the attorneys say is evidence." This instruction supports both the reasonableness of counsel's decision not to object and the absence of ensuing prejudice.

To satisfy *Strickland*'s two-part test, a "defendant must show that counsel's representation fell below an objective standard of reasonableness" (*Strickland*, *supra*, 466 U.S. at p. 688), and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id*. at p. 694). "It is particularly difficult to prevail on an appellate claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*).)

We conclude that Criado has not shown his trial counsel was prejudicially ineffective in failing to object to the prosecutor's challenged statements. "Whether to object at trial is among 'the minute to minute and second to second strategic and tactical decisions which must be made by the trial lawyer during the heat of battle' " and "[s]ometimes, the best action an attorney can take regarding an available objection is not to make it." (*People v. Riel* (2000) 22 Cal.4th 1153, 1202.) On the record before us, Criado has not shown that his counsel performed deficiently by failing to object to two passing statements of the prosecutor that did not clearly constitute misconduct.

The prosecutor's reference to logistical difficulties in procuring the victim's testimony can be viewed as fair argument, reminding the jury that the prosecution had the burden of proof and asserting that it did so despite the general burden of procuring witnesses. Moreover, the statement about the damage to the bridge, even if not a fact in evidence before the jury, did not constitute vouching, as it did not suggest anything about the content of the witness's testimony. (See *Rivera*, *supra*, 7 Cal.5th at p. 336.)

Likewise, it was not misconduct for the prosecutor to thank the jurors alongside a reference to the Monterey County District Attorney. (See *People v. Fauber* (1992) 2

Cal.4th 792, 826, fn. 8 [rejecting the defendant's assertion of prejudice based on the prosecutor's statements thanking the jurors for the guilt phase verdict].) To prevail on a claim on ineffective assistance of counsel, Criado must set forth affirmative evidence that counsel had no rational tactical purpose for an action or omission. (*People v. Woodruff* (2018) 5 Cal.5th 697, 746.) Here, Criado offers no such evidence. Accordingly, his ineffective assistance claim fails.

Even if we assume for argument's sake that defense counsel's performance was deficient, Criado cannot demonstrate prejudice because, contrary to Criado's contention, this was not a close case. As detailed further below, the prosecution's case included uncontested direct physical evidence and percipient testimony from the victim, as well as testimony from Criado himself that confirmed much of the case against him.

The jury deliberations were also brief and provide no indication that the jury was struggling with the factual disputes in the case.[4] (See *People v. Merriman* (2014) 60 Cal.4th 1, 99–100.) In sum, even if counsel's performance was deficient, there was no resulting prejudice to Criado. (*Strickland*, *supra*, 466 U.S. at p. 687.)

B. *Instructional Error*

Criado also argues that the trial court's instruction to the jury on the enhancement for personal use of a deadly or dangerous weapon (§12022, subd. (b)(1) (hereafter § 12022(b)(1)) constituted error because it included a "legally invalid alternative ground" for a true finding. Criado asserts that it was error to instruct the jury that his knife was "inherently deadly or dangerous." But Criado concedes that the trial court's instruction also included the "legally correct" theory that the jury could find the enhancement true if

[4] The jury took less than two and a half hours to convict Criado on the robbery and possession charges. About half an hour after deliberations began, the jury asked to hear the testimony of the victim and an investigating officer again. The two and a half hours of deliberation includes 36 minutes the jury spent listening to the court reporter's readback of the requested testimony. Other than the request for readback, the jury did not submit any questions to the trial court during its deliberations.

it found beyond a reasonable doubt that Criado had used the knife in a way capable of causing and likely to cause death or great bodily injury. Criado emphasizes that the error here was "legal error" and not "factual error." Criado argues that the error was prejudicial because "[t]here is no basis in the record to determine which definition of 'deadly or dangerous weapon' the jury used to reach its verdict."

The Attorney General agrees with Criado that the knife here was not "inherently deadly" and that the jury was properly instructed that it could find true the enhancement if it determined that Criado used the knife in a way capable of causing and likely to cause death or great bodily injury. But the Attorney General argues that the instructional error was harmless under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

1. Factual Background

The information charged Criado in count 1 with second degree robbery (§ 211) of David I.[5] and alleged that Criado had used a deadly or dangerous weapon, a knife, in the commission of the robbery (§ 12022(b)(1)).

At trial, Deputy Zachariah Swift testified that he searched Criado when Criado was arrested and found a knife, folded closed, in Criado's right front pocket. The knife was admitted into evidence.

On the night of the charged crimes, David was working in Big Sur at a gas station that sells "snacks, cigarettes, and gasoline." He arrived at the gas station around midnight, when the station was closed, to do "the night watch."

Upon arriving, David saw that the door to the gas station had been opened, the refrigerator was "a mess," and a lock on one of the gas pumps had been removed. David called 911, and a car approached the station. David told a man in the car who asked for gas that the station was closed. The car left but then returned; the same man got out of

[5] To protect the victim's privacy, we refer to him by his first name and the first initial of his last name and then by his first name only. (Cal. Rules of Court, rule 8.90(b)(4).)

the car and asked David for milk. David told the man, whom he later identified in court as Criado, that the store did not sell milk.

After David told Criado the store did not sell milk, Criado approached David, who was standing in the doorway. Criado had a knife in his right hand; his hand was "flexed" and at waist level. David stepped aside when he saw the knife. Criado went inside the store, opened the store cooler, grabbed a coconut water, and came back out. David told Criado "he couldn't take it like that." Criado had the knife and the juice in his hand and said "Grab what?" Because Criado was "pointing at [him] with the knife," David replied, " 'Nothing. I don't see nothing.' " Criado said, " 'That's right' " and walked away.

When shown a photo of the knife found in Criado's pocket, David described the knife in the photograph as a "pocket knife." David stated that the dimensions of the knife in the photograph "look about right" in terms of the knife he saw that evening, but that night he only saw the blade and not the handle. David testified, he was "[m]ore than afraid" that night.

Sergeant Jason Smith, who participated in the investigation of the crime, testified that the tip of the knife was bent "as if it had been obviously used to pry on something" and the width and depth of the blade "matched the exact pry marks and scrape marks" that had been left on the gas pump lock at the gas station.

Criado testified that the knife admitted into evidence belonged to him. Criado stated that he never pulled out the knife inside the store and did not have the knife in his hand when he left the store. Criado did not position himself so that the store clerk could see his knife. Criado pried off a plastic piece off the gas pump with his knife but did not use the knife on the door of the store. When the officers arrested Criado, he had the knife "clipped on [his] side."

With respect to the section 12022(b)(1) enhancement, the trial court provided the jury with CALCRIM No. 3145, which instructed "[a] deadly or dangerous weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in

such a way that it is capable of causing and likely to cause death or great bodily injury." The instruction also stated that "[s]omeone personally uses a deadly or dangerous weapon if he or she intentionally . . . [¶] [d]isplays the weapon in a menacing manner."

2. Legal Standards

Both parties agree that inclusion of the language "inherently deadly or dangerous" in the jury instruction for the section 12022(b)(1) enhancement was error. Determining whether that error was prejudicial "turns on a two-step inquiry: (1) whether the error was factual error or legal error; and (2) what prejudice standard applies." (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 318.)

The California Supreme Court recently addressed both questions in *People v. Aledamat* (2019) 8 Cal.5th 1 (*Aledamat*). As here, the *Aledamat* jury had been instructed using CALCRIM No. 3145 to evaluate whether the prosecution had proven an allegation under section 12022(b)(1) that the defendant had used a deadly weapon, a box cutter, when making a criminal threat.[6] (*Aledamat*, at pp. 4–5.) The California Supreme Court concluded the inclusion of the phrase "inherently deadly" in CALCRIM No. 3145 was legal error. (*Aledamat*, at p. 8.)

Turning to the question of prejudice, the Supreme Court held that "the usual 'beyond a reasonable doubt' standard of review established in *Chapman* [] for federal constitution error applies" (*Aledamat*, *supra*, 8 Cal.5th at p. 3) to cases of "alternative-theory error," that is, when the jury is instructed on both a valid and an invalid theory. (*Id*. at p. 7, fn. 3.) Under the *Chapman* standard, a "reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error was harmless beyond a

[6] The jury in *Aledamat* had also been instructed with CALCRIM No. 875 for the charge that the defendant had committed assault with a deadly weapon, a box cutter, in violation of section 245, subdivision (a)(1). (*Aledamat*, *supra*, 8 Cal.5th at p. 5.)

reasonable doubt." (*Aledamat*, at p. 3.) The Supreme Court determined in *Aledamat* that the legal error was harmless. (*Id*. at pp. 3–4.)

The California Supreme Court explained in *Aledamat* that one way to evaluate whether an error was harmless beyond a reasonable doubt is to ask whether it was possible for the jury to find that the knife was inherently deadly without also finding it "capable of causing and likely to cause death or great bodily injury." (*Aledamat, supra*, 8 Cal.5th at pp. 13–14.) As *Aledamat* explains, "most objects are not inherently deadly even if they may be used in a way that makes them deadly." (*Id*. at pp. 15–16.) "A box cutter is not inherently deadly because it is not designed for that purpose. But if used to assault someone, i.e., used as a weapon, a box cutter is potentially deadly even if not designed for that purpose." (*Id*. at p. 14.)

Criado's argument that the error was prejudicial supposes that there were two separate ways in which the jury could have found that Criado's knife was a deadly weapon (i.e., by its nature or by its use) due to the instruction's use of the disjunctive "or." (See *Aledamat, supra*, 8 Cal.5th at p. 13.) However, just as in *Aledamat*, Criado's jury likely viewed the question as a "unitary" inquiry requiring consideration of "the circumstances in deciding whether the object was a deadly weapon." (*Id*. at p. 14.)

Here, the jury was instructed that robbery required the intent to use force or fear to take someone else's property; "fear" meant the victim's fear of injury to himself; and Criado personally used a deadly weapon by "[d]isplay[ing] the weapon in a menacing manner." The jury was also told to consider the deadly weapon inquiry solely in relation to the robbery charge (count 1). Given these instructions, "it seems unlikely the jury would simply view the [knife] as inherently deadly without considering the circumstances" of its use. (See *Aledamat, supra*, 8 Cal.5th at p. 14.)

The question of "use" in this case was intertwined with the knife's role " 'as an aid in completing an essential element of the crime of robbery—the taking of personal property "accomplished by means of force or fear." ' " (*People v. Masbruch* (1996) 13

Cal.4th 1001, 1007, italics omitted (*Masbruch*).) For count 1, the jury was given the option of convicting Criado on the lesser-included offense of theft by larceny, which had no "force or fear" element and did not require any consideration of the knife. Therefore, the jury's guilty verdict on the robbery charge and its true finding on the personal use enhancement could not have been reached absent a " 'facilitative nexus' " between Criado's knife, the victim's fear, and furtherance of the illegal taking by virtue of this fear. (See *People v. Bland* (1995) 10 Cal.4th 991, 1002.)

" 'No reasonable jury that made all of these findings could have failed to find' that [Criado used the knife] in a way that is capable of causing or likely to cause death or great bodily injury." (*Aledamat, supra,* 8 Cal.5th at p. 15.) In other words, no reasonable jury making the findings made by Criado's jury would have concluded that the knife was "inherently deadly" but was *not* "used in such a way that it is capable of causing and likely to cause death or great bodily injury." (CALCRIM No. 3145.) Therefore, we reject Criado's argument that we must reverse the true finding on the enhancement under the standards articulated in *Chapman*.

Criado also contends that the instructional error was prejudicial because "the record is all but unequivocal that [Criado] did not use the knife in a manner capable of causing and likely to cause great bodily injury." To the extent Criado argues that the evidence was insufficient for the jury to make a true finding on the enhancement, we disagree.

" 'In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170.) From David's trial testimony, a reasonable jury could conclude that Criado knowingly displayed his knife in a menacing manner in furtherance of " 'an essential

element of the crime of robbery—the taking of personal property "accomplished by means of force or fear." ' " (*Masbruch, supra*, 13 Cal.4th 1001, 1007, italics omitted.) Therefore, substantial evidence supports the jury's true finding on the personal use enhancement.

III. DISPOSITION

The judgment is affirmed.

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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GROVER, J.

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